Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-375

ARNOLD ARTHUR SONDEREGGER,

PLAINTIFF-APPELLANT-PETITIONER

V.

SAGITTARIUS PRODUCTIONS, INC.,
CINERAMA RELEASING CORPORATION, AND
SEELEG LESTER,
DEFENDANTS-APPELLEES-RESPONDENTS

RICHARD WESSON REMAINING IN SUPERIOR COURT,

DEFENDANT.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT, THE COURT OF LAST RESORT

ARNOLD ARTHUR SONDEREGGER
IN PROPRIA PERSONA
233 SO LAFAYETTE PK. PL. APT.
122, LOS ANGELES, CALIF. 90057

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO.....

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SAGITTARIUS PRODUCTIONS, INC.,
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RICHARD WESSON REMAINING IN SUPERIOR
COURT,
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PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT, THE COURT OF
LAST RESORT

OPINIONS BELOW

The California Supreme Court denied the
petition for hearing June 9, 1976, and

the petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the state of California, Second appellate district, Division one, which is thirteen pages dated April 13, 1976, that was marked:

"Not For Publication",

which was in regard to orders of the Superior Court of Los Angeles County of Arnold Levin, Judge Pro Tempore, and Norman R. Dowds, Judge, and which concluded:

"In the light of our opinion herein, we deem it unnecessary to review the validity of the second ground (statute of limitations) on which the demurrer of the corporate defendants was sustained.

The orders of dismissal are affirmed."

LILIE, J. AND

"We concur;" WOOD, P.J. AND THOMPSON, J.

In the Superior Court of California, County of Los Angeles ARNOLD LEVIN,

Judge Pro Tempore ruled on June 6, 1974:

"Motion of defendant Seeleg Lester for dismissal. Demurrer is sustained for failure to stste facts sufficient to constitute a cause of action without leave to amend."

The matter of statute of limitations was brought up by Seeleg Lester's attorney, but the judge did not rule against the plaintiff on the matter. Also, no answer was made in the California Court of Appeals or California Supreme Court.

In the Superior Court of California, Los Angeles County NORMAN R. DOWDS on June 13, 1974 made a ruling that the clerk dated and served on the parties June 18, 1974, which stated:

"Demurrer of defendants Sagittarius Productions, Inc. and Cinerama Releasing Corporation to first amended complaint.

(Continuation of ruling)

"Plaintiff's oral motion for continuance is denied. Demurrer sustained per C.C.P. 410.10(e) for failure to state a cause of action and because of the statute of limitations, without leave to amend.

See moving parties' points and authorities. Moving parties give notice."

On May 21,1974 Superior Court Judge CHARLES H. CHURCH ruled:

"Motion of plaintiff Arnold Arthur Sonderegger to compel Sagittarius Productions, Inc. to answer certain interrogatories. Granted. Require answers or objections within 20 days after complaint states a cause of action. Plaintiff is to give notice."

JURISDICTION

Jurisdiction is conferred on the court by 28 § 1257. State Courts; ..Certiorari

"Final judgments or decrees rendered by highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as dollows:

(3)By writ of certiorari...where a title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes...of the United States.(1949)

PLAINTIFF SECURED PROTECTION BY REGISERING PLAY UNDER 17 U.S.C. SECTION 12

From the First Amended Complaint p. 16, par. 36:

"From the United States Government publication called Copyright Entries Jan.-June 1959, Dramas.."Change Of Mind, DU23122. See Donderegger, Arnold Arthur."

And par.37:

"Sonderegger, Arnold Arthur. Change Of Mind, a dramatic play in seven scenes. (c) Arnold Arthur

Sonderegger; lc 6 Feb50 DU23122."

17 USC sec. 12 protects unpublished works not reporduced for sale, but only those listed but excludes books etc.

From section 12:

"Copyright may also bd had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work, if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; of a title and description, with one print taken from each scene or act, if the work be a motion-picture photoplay; of a photographic print if the work be a photograph; of a title and description with not less than two prints taken from different sections of a complete motion picture,

(Cont.Sec.12)

if the work be a motion picture other than a photoplay; or a photograph or other identifying reproduction therof, if it be q work of art or plastic work or drawing. But the prilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from deposit of copies, under sections 13 and 14 of this title, where the work is later reproduced in copies for sale."(July 30, 1947)

And further in the case of unpublished works under 17 USC 12, the term of copyright commences upon the deposit of the work with Copyright Office for the first 28 years, and upon publication, in order to continue protection a second deposit and registration is necessary and the date of protection dates back to the original registration. Marx v United States, F 2d 96(9th Cir. 1938).

Note: The registration of unpublished works such as the plaintiff's play and its title have copyright protection preser-ed until publication and then, an additional registration and fee and deposit is necessary to protect the new right of multiplying copies for distribution and sale.

PROVISION FOR STATE COMMON LAW

17 USC §§ 2.Right of author or proprietor of unpublished work

"Nothing in this title shall be construed to annul or limit the ight of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor." (July 30, 1947)

Nimmer On Copyright §§93.3 page 354:

..."question is as to whether Sec. 2 preserves common law copyright in unpublished works even after statutory

copyright is obtained under Sec. 12.

A literal application of 17 USC Sec. 2 might mean an author who registers under Sec. 12 may thereafter (as long as his work remains unpublished) claim both common law and statutory copyright as alternative remedies."

FEDERAL COURTS CAN HEAR STATE COURT IF EXERCISE THEIR DISCRETION TO DO SO

28 USC sec. 1338. Patents, plant variety protection, copyrights, tradmarks, and unfair competition

"(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases."

28 USC ss 1338:

"(b)The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trade-mark laws.(June 1948,Dec.1970)

THE STATUTE OF LIMITATIONS WAS TOLLED BY CONCURRENT JURISDICTION IN THE FEDERAL COURT AND THE STATE COURT ON QUESTIONS OF STATE LAW.

On October 1, 1969 the defendants caused to be printed in both the Los Angeles and New York Times an advertisement for a motion picture titled "Change Of Mind." This ad, in referring to the movie, contained the following language: "'Written by Seeleg Lester and Richard Wesson.'" Thereafter the motion picture was shown in 37 different

theatres in New York, and about 27 in Southern California and one in New Jersey. and after notice in Los Angeles, California at the State Theatre Febr. 23 thru 29, 1972.

The inringements were the same for the federal questions as state questions, but the remedies are different.

When the complaint was filed March 27, 1971 and the summons duly served on Cinerama Releasing Corporation, Sagittaruis Productions Inc., Seeleg Lester and Richard Wesson it was less than the two year statute of limitations on the state court questions and less than the three years on federal copyright questions.

In the federal court October 4, 1971 Hon. A. Andrew Hauk used his discretion not to hear the state court, state law questions in the federal court. From the Reporter's Transcript in case No.71-724AAH:

"Court...If you claim so-called California common law copyright, go to the State Court."

And lines 19 and 20:

"Go to the State Court, I am sorry, this is the end of the line. The motion to Dismiss is granted."

and lines 15, 16 and 17:

"...Go to the State Court and stop spinning you wheels over here. It is good advice, believe me."

Further in regards to the state court complaint being timely filed. In the California C.C.P. sec. 350 ACTION COMMMENCED WITH THE FILING OF COMPLAINT;

"An action is commenced within the meaning of this Title, when the complaint is filed.(1872)

When a complaint and summons are filed and duly served it gives notice of being held accoutable for their actions

by concurrent jurisidctions, because federal law gives federal judges jurisdictional discretion to hear or not hear related and substantial state law questions.

ACTION FILED IN STATE COURTS IN REASONABLE TIME

On October 14, 1971 dismissed the action in the United States District Court for the Central District of California, and the United States Court of Appeals for the Ninth Circuit "affirmed" on November 30, 1972, and the Supreme Court of the United States "denied the hearing" on October 8, 1973.

From Oct. 1, 1969 to March 27, 1971 is one and half years, which is less than two years from infringement to federal court, and it was in federal court until Oct. 8, 1973, and from the time of leaving the federal court to filing in state court Jan. 14, 1974 was three months and 3 days.

So, 2½ years and 3 mo. and 8 days when added together still is less than 2 years, which makes it a reasonable time to move to the state court.

Arnold Levin, Judge Pro Tempore ruled in favor of plaintiff on the matter of statute of limitations and Norman R. Dowds, Judge of the superior court ruled against the plaintiff. Sagittarius Productions, Inc., and Cinerama Releasing Corporation through their attorneys cited in their demurrer to the first amended complaint Schneider vs Schimmels, 64 Cal. Rptr. 273 (1967). This is a case between two different state courts, which is irrelevant, because in the present case there is federal court jurisdiction and concurrent jurisdiction on state law in federal court and state law in state court. According to

California Bus. and Pro. code there may have been a violation if the judge was decieved by corporate defendants quoting a case between two state courts, when the matter involved federal and state court.

It is the belief of the plaintiff that the statute of limitations were tolled, but even if not it is important that the case would not be solely decided by it, because the movie using the title "Change Of Mind" as above mentioned was subsequently used in a new medium and the dates of theses violations could be brought in on a second amended complaint. The dates the Sagittarius Productions, Inc., producer and Cinerama Releasing Corporation exhibited on television are as follows:

5-15-74 CBS Network 11:30 P.M. Wednesday.

5-18-74 Denver Channel 7,12:55A.M Sat.

6-5-74 Denver Channel 5, 10:30P.M.Wed.

6-5-74 Hawaii Channel 9-3-9,12:30AM Wed.

5-7-75 Columbia Broadcasting System Network, 11:30 P.M. Wednesday

5-14-75 Dallas Channel 4, 11:00P.M.Wed.

5-28-75 Las Vegas ch. 5, 11:30 P.M. Wed.

5-28-75 Denver ch. 5, 10:40 P.M. Wed.

6-4-75 Denver ch. 2, 11:30 P.M. Wed.

5-28-75 Honolulu ch.9, 12:00P.M.Wed.

Thus, Tne two dated of the Columbia Broadcasting System exhibited the picture includes California. Information is from T.V. Guids and Hollywood Actor's Guild.

AUTHORITY FOR CONCURRENT JURISDICTION

Art. VI, Sec. 2, which is the supremacy clause makes the federal law 28 USC 1338 as prevailing, and the case of GOLDSTEIN V. CALIFORNIA 93 S.TC.2303 (1973), and 17 USC sec, 2.

THE UNITED STATES CONSTITUTION IN ARTICLE I, Sec. 3, Cl.8 IS NECESSARY FACTOR IN

RESOLVING AMBIVALENCE IN STATE COMMON LAW STATUTE AND CONFLICTING STATE COURT OF SAME LEVEL DEDISIONS

In the U.S. Constitution Art. I, Sec.8. Cl.8 it reads:

> "...to promote the progress and useful arts by securing for authors for limited times..."

In GOLDSTEIN V CALIFORNIA 93 S.CT.(1973) p. 2312:

> "By Art. I, §8, cl.8, of the Constitution, the States granted to Congress the power to protect the "Writings" of "Author." These terms have not been construed in narrow literal sense but, rather, with the reach necessary to reflect the broadscope of constitutional principles.

While an "author' may be viewed as an individual who writes an original composition, the term, in its constitutional

sense, has been construed to mean an "originator" "he to whom anything owes its origin."

The California Civil Code Section 980 in regards to common law copyright states:

"(a) The author or proprietor of any composition in letters or art has an exclusive ownership in the representations or expression thereof as against all persons except one who originally and independently creates the same or similar composition."

The word "expression" is ambiguous and as a result the statue is ambivalent as to protecting the "title" of a drama as a writing if it is distinctive, and from being severed from the body part of the play.

There are two conflicting opinions in two California Court of Appeals cases.

In Johnston v Twentieth Century Fox Film Corporation 82 Cal. App. 2d 796; 187 P. 474:

In this case no claim of control of the first publication was ever made, because a book cannot be registered until 17 USC sec. 12, as an unpublished work, but must only get copyright protection after publication. In the state court the book had already received wide publication when the court ruled a "distinctive title" can be protected by C.C.sec. 980 from being divorced from its works, but the book title "Queen Of The Flat Tops" did not have the element of unpublished work for common law copyright.

(Note: The court awarded the plaintiff $20,000 for the title separated from the works on the basis of sufficient secondary meaning with the public.)

In the present above captioned case, the California Court Of Appeals ruled the title was not protected when severed from the works even though it registered as unpublished with the federal copyright office in 1950 had "distinctiveness".

This leaves the question to be resolved by the intent from U.S. Const. Art. I, §8, cl.8, ..."to promote progress".

If a writer sells his title and drama attached together to a producer, and then, a second producer comes along and uses the title for his own drama, the first producer might find his title used on a television show before he gets his big production for theatres finished. Thus, it seems logical that the title should be protected when it has "distinctiveness" from being severed by a second producer injuring his title that was copyrighted with the play. Then, the first producer can plan his budget

and a production and buy a play with its title, if the title is "distinctive" by the author registering his play with its title in Federal Copyright Office under 17 USC §§ 12 which would protect an author and producer from an infringer while working on his production.

This is in keeping with the <u>intent</u> of the United States Constitution Art. I,§§ 8, cl. 8,.. to promote prgress in the useful arts .. for limited times.

Since, this registration starts the first 28 years of protection, by preseving the right of first publication (and publication would reguire a seocnd registration for that protection) then, it complies with the Federal Constitution of "<u>limited times</u>", and the State of California Commonlaw

statute C.C.§ 980 and common law copyright in general, would then, qualify as not being contrary to the United States Constitution in regards to Copyright.

PROTECTING THE TITLE OF A PLAY FROM BEING SEVERED FROM THE PLAY IS NOT IN CONFLICT WITH FEDERAL COPYRIGHT STATUTES AND THE FEDERAL CONSTITUTION

Nimmer on Copyright §§ 34 page 140:

"As a matter of first impression it might well be argued that finciful original titles should be regarded as a form of literary expression protectible under the copyright laws. Moreover, nothing in the copyright Act itself expressly precludes such protection..."

IN THE FEDERAL COURT IN THIS OBOVE ENTITLED CASE IT WAS RULED THAT THE

PLAINTIFF'S TITLE "CHANGE OF MIND" DID NOT HAVE EXCLUSIVE PROTECTION IN FEDERAL LAW WHEN SEVERED FROM THE PLAY; SO, STATE LAW WOULD NOT CONFLICT IF THE TITLE WAS PROTECTED FROM BEING SEVERED.

In GOLDSTEING v CALIFORNIA 93 S. CT. 2303 (1973) on page 2307 it states:

"17 U.S.C. section 2 allows States to protect unpublished writings. 17 USC § 2 provides: "'Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefore."

Continuing on page 2310:

GOLDSTEIN V CALIFORNIA supra:

"Since the subject matter to which the Copyright Clause is addressed may thus be purely local importance and not worthy of national attention or protection, we cannot discern such an unyielding national interest as to require an inference that state power to grant copyrights has been relinquished to <u>exclusive</u> federal control."

Continuing <u>GOLDSTEIN</u> V <u>CALIFORNIA</u>,2311:

"Similarly, it is difficult to see how the concurrent exercise of the power to grant copyrights by Congress and the States will necessarily and inevitably lead to difficulty. At any time Congress determines that a particular category of "writing" is worthy of national protection and incidental expenses of federal administration, federal copyright protect-

(Continuing <u>GOLDSTEIN</u> V CALIFORNIA, supra)

"tion may be authorized. Where the need for free and unrestricted distribution of a writing is thought to be required by the national interest, the Copyright Clause would allow Congress to eschew all protection. In such cases , a conflict would develop if a State attempted to protect that which Congress intended or to free that which Congress determines that neither federal protection nor freedom from restraint is required by the national interest, it is at liberty to stay its hand entirely, for example, Congress has allowed writings which may eventually be the subject of a federal copyright, to be protected under state law prior to publication 17 USC §2. Since state

(Continuing GOLDSTEIN V CALIFORNIA)

protection would not then conflict with federal action, total relinquishment of the States "power to grant copyright protection cannot be infered."

CONSTITUTIONALITY OF WRITINGS

In the case of GOLDSTEIN V CALIFORNIA 93 S.CT. 2303 (1973) page 2312,n.(10)

"By Art. I, §§ 8, cl. 8, of the Constitution, the States granted to Congress the power to protect the "writings" of "Authors." These terms have not been construed in their narrow literal sense but, rather, with the reach necessary to reflect the broad scope of constitutional principles. While an "author" may be viewed as an individual who writes an original

(Continuing GOLDSTEIN V CALIFORNIA)

"composition, the term, in its constitutional sense, has been construed to mean an "originator," "he to whom anything owes its origin." Burrow-Giles Litographic Co. v Sarony, 111 U.S. 53, 58, 4 S.CT. 279, 281, (1884). Similarly, although the word "Writings" might be limited to script or printed material, it may be interpreted to include any physical rendering of the fruits of creative intellectual or esthetic labor. Ibid."

A COPYRIGHTABLE TITLE IS PART OF THE WORKS REFERED TO COPYRIGHT ACT.

In BECKER V LOEW'S, INC.133 F.2d 889 on page 891 of note 4:

"The chief similarity between the two works is identity of title..."

And cited in the case for authority

was 17 U.S.C. §§ 4 of the copyright act:

"The works for which copyright may be secured under this title shall include all the writings of an author."

The test for "distinctive" or copyrightable titles will be brought up in the ARGUMENT.

Thus, titles can qualify as "writings" in the Constitutional sense. Since the federal courts only protect the title along with the remaining part of the works, then, state courts in state law are free to protect the exclusive use of a title, that is "distinctive" from being severed from the remaining part of the whole works. State common law copyright is not obscured from giving this protection.against an infringer.

DECEIT IS A COMMON LAW, STATE LAW MATTER.

From the Second Amended Complaint page 4 captioned JURISDICTIONAL RELATIONSHIP:

"To begin with a case in the Supreme Court of the United States in COMPCO., V DAY BRITE LIGHTING, INC., 377 U.S. 913; 84 S. CT. 1162 on pp.782, 783 by: "Mr. Justice Harlan, concurring in the result." (And from note on bottom of the page. 'This opinion applies also to SEARS, ROEBUCK & CO. V.STIFFEL CO.!")

"In one respect I would give the States more leeway in unfair competition "copying" cases than the Court's opinions would allow. If copying is found, other than by an inference arising from mere act of copying, to have been undertaking with the dominant purpose and effect of palming off one's goods as those of another

(Continuing from Justice Harlan)

"or of confusing customers as to the source of such goods, I see no reason why the State may not impose reasonable restrictions on the future 'copying' itself. Vindication of the paramount federal interest at stake does not require a State to tolerate such specifically oriented predatory business practices. Apart from this, I am in accord with the opinions of the Court, and concur in both judgments since neither case presents the point on which I find myself in disagreement."

In LEAR, INCORPORATED V JOHN S. ADKINS decided June 16, 1969 and cited 89 S. Ct. 1902 in which Mr. Justice Black, Chief Justice and Mr. Justice Douglas join...:

"Brother Harlan concurred in the result in those cases saying- contrary to what the court held-" I see no reason why the State may not impose reasonable restrictions on the future 'copying' itself." COMPCO, supra, at 239, 84 S.CT. at 783. Consequently the Court is today joining in the kind of qualification that only Mr. Justice Harlan was willing to make at the time of our STIFFEL AND COMPCO decisions."

THUS, STATE OF CALIFORNIA HAD JURISDICTION TO HEAR THE QUESTION OF "DECEIT" AND "IMPAIRMENT OF TITLE", BECAUSE WHEN PLAINTIFF USES HIS TITLE FOR HIS OWN PLAY THE PUBLIC WOULD BE DECEIVED INTO THINKING IT WAS THE DEFENDANTS MOTION PICTURE THAT DISTORTED PLAINT-

TIFF'S TITLE FOR HIS OWN USE.

In the plaintiff's First Amended Complaint on page 22, par. 77 it states:

In the catalog of Copyright Entries- Motion Picture and Filmstrips, July-December 1970,

"Change Of Mind". Sagittarius Productions. Released by Cinerama Releasing Corporation. 103 min., sd.color, 35 mm c Sagittarius Productions Inc.; 1 Oct..69;LP38;8;."

The defendants cannot assert the protection of the copyright statute of protecting the title and the play together which belongs to Arnold Arthur Sonderegger which reads from the First Amended complaint on page 16: Copyright Entries:

"Sonderegger, Arnold Arthur. Change Of Mind, a dramatic play in seven scenes. c Arnold Arthur Sonderegger

(Continuing from Copyright Entries)

"1c 6 Feb50 DU23122."

The defendants cannot assert the 1970 entry against the 1950 entry of the plaintiff.

The SEARS AND COMPCO cases supra showed that copyright cannot be overtaken by mere copying.

PLAINTIFF'S TITLE "CHANGE OF MIND" IS HIS ORIGINAL TITLE AND NOT USED WORD FOR WORD [illegible] BY ANYONE ELSE IN THE COPYRIGHT CATALOGS.

On page 22 of plaintiff's First Amended Complaint it states:

"In 1960 Rose Schneideman registered the title Change Of Mind which is ten years following the plaintiff's copyright, and notice is given to her to cease and desist from any use of the plaintiff's title."

THE PLAINTIFF HAS BEEN DEPRIVED OF HIS INTANGIBLE PROPERTY RIGHTS IN VIOLATION OF THE 5TH and 14TH AMENDMENTS RIGHTS UNDER DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION, BECAUSE THERE WER TWO TRIABLE ISSUES OF FACT THAT WERE NEVER HEARD ON THE MERITS.

From the petition for hearing in the Supreme Court of California on page 7 & 8:

"The Court of Appeal of the State of California, Second Appellate District, Division One, Lillie, J and Wood, P.J. and Thompson,J. did not recognize the triable facts which are part of two causes of action upon which relief can be granted.

I. The cause of action of common law copyright has the essential elements

to prevail in this case.

II. The amount of injury caused by defendants affixing the plaintiff's title "Change Of Mind" to their drama, when plaintiff produces his drama the public would be deceived by the title and the title received disparagement by distorting the title.

STATEMENT OF THE CASE

This is quoted from the decion of the Court of Appeals decision of California supra to save time. LILLIE, JUDGE:

"The trial court sustained defendants' general demurrers without leave to amend, and entered orders of dismissal of plaintiff's first amended complaint. [1](Richard Wesson was also named as a defendant in this pleading but is not a party to the appeal.)

PAGINATION ERROR

TEXT IN SEQUENCE

"He appeals from the orders.

The first amended complaint, the non-conclusionary allegations of which we accept as true, allegses: In February 1950 plaintiff copyrighted with the Federal "Copyright Office" an original play authored by him titled "Change Of Mind," the copyright to run for 28 years from that date. The play was never "produced or published." On October 1, 1969, defendants caused to be printed in both the Los Angeles and the New York Times newspapers an advertisement for a motion picture titled "Change Of Mind." This ad, in referring to the movie, contained the following language: "'Written by Seeleg Lester and Richard Wesson.'" Thereafter the motion picture was shown in

37 different theatres in New York, about 27 in Southern California and one in New Jersey. Although the picture did not use any of the context of plaintiff's play, defendants separated "the title from the work" and used "plaintiff's title for their own dramatic work"; and "(t)he defendants infringed the common law copyright by appropriating the plaintiff's title, because the title had distinctivenes (sic)." The complaint prayed for "an accouting of all the profits fom the film using the plaintiff's title, CHANGE OF MIND:; compensatory damages for the use of the title and for "breach of implied in fact and in law contract" with plaintiff: punitive damages for defendants' wilful use of the title after being put on notice

of the "infringement"; and that "a permanent injunction issue to reestrain defendants from using the title. " "Corprate defendants demurred to the complaint on the grounds that it did not state a cause of action and was barred by the applicable statute of limitations (seciton 339, sub.Sec.1, of the C.C.P.); defendant Lester demurred separately on the ground that the complaint did not state a cause of action. The trial court entered a minute order sustaining Lester's demurrer without leave to amend, on the ground of "failure to state facts sufficient to constitute a cause of action", and another, sustaining the corporate defendants' demurrer without leave to amend, "for failure to state a cause of action and because of statute of

limitations." It thereafter entered separate orders of dismissal in relation to each minute order. ...

"Thus, because the trial court dismissed the cause primarily on the ground that the complaint does not state a cause of action, we are faced squarely with the issue of whether the use of the bare title of a literary wotk on an entirely different creative work is actionable."

Other aspects of the case have already been mentioned in this petition.

THE ARGUMENT

I. The plaintiff's title CHANGE OF MIND required some intellectual labor and was "distinctive" in that it met all the requirements as set forth in the JOHNSTON v TWENTIETH CENTURY FOX FILM CORPORATION 82 Cal. App. 2d 796;

187 P. 2d 474: Page 797:(

"Subject Matter- Title.
The title "Queen Of The Flat Topss" is an arbitrary, fictitious, fanciful, artificial, distinctive and nondescriptive combination of words, as applied to an aircraft carrier; it is a product of the mind; and the author and publisher of the book carrying the title had the right to its use exclusive use for all purposes."

This above mentioned case is in the annotated section of Calif. Civil Code section 980 which reads:

"(a) The author or propriet of any compostion in letters or art has an exclusive ownership in the representation or expression thereof as against all persons except one who originally and independently creates the same

or similar composition."

The Johsnton case supra stated the title divorced from the works was protectable if the title was distinctive, but it did not qualify as unpublished, and so prevailed for "$2),000 for the title on oral contract and secondary meaning.

The plaintiff title CHANGE OF MIND all all the essential elements of unpublished and distinctive title, and also, registered in federal court with the first 28 year time limit that complies with the federal constitution.

Opposition cited the California Supreme Court Case of JACKSON V UNIVERSAL INTERNATIONAL PICTURES, 222 P.2d 433 with the title "Slightly Scandalous" which may have had "distinctiveness", but lacked an essential element for

(JACKSON case)
common law copyright, which was to be unpublished for the control of the first publication. It was produced in Philadelphia and on the stage in a theatre in New York for seven days.

It is the contention of the plaintiff that it was an error in law not to allow this cause of action to be tried on the "distinctiveness" of plaintiff's title, and thus, protectable from being severed by infringing defendants.

In NIMMER ON COPYRIGHT 1975 vol. 1 pages 19 and 20:

"Prerequisites of Writings

Despite the liberal construction which has been applied in delineating the constitutional concept of writings, the courts have nevertheless prescibed certain minimum standards which

a work must meet in order to attain this status. These may be summed up in two requirements of intellectual labor and tangible form.

"Intellectual Labor. (Cont. NIMMER)

"...It is important to distinguish between the requirement of originality and the requirement of intellectual labor. Although treated interchangable by some courts, there would appear to be some distinction between the two concepts. The doctrine of originality stems from the Copyright Caluse's use of the term "author" and refers to independent creation. Intellectual labor on the other hand, suggests an absolute standard, albeit, a highly minimal one, of creativity ...having stated the requirement of intellectual labor, it is important to add that a very slight degree of

(Cont. Nimmer On Copyright)

such labor will be sufficient to qualify the work as a writing in the constitutional sense. Thus, almost any ingenuity in selection, combination or expression, no matter how crude, humble or obvious, will be sufficient to render the work a writing. NATIONAL TEL. NEWS CO. V WESTERN UNION TEL. CO., 119 Fed 294 (7th Cir. 1902)

The title CHANGE OF MIND is a combination of words and copied word for word which establishes an implied-in-law contract to establish damages.

One word alone would not establish intellectual labor, and would allow the distionary to be copyrighted away.

From plaintiff's First Amended Complaint page 17, par. 48:

The defendants infringed the common

law copyright by misappropriating the plaintiff's title, because the titlé had distinctivness.

II."The second cause of action is deceit under unfair competition because when plaintiff's drama is published and produced the general public to the estent the the defendants advertised and exhbitied the plaintiff's title CHANGE OF MIND by affixing the title on their own drama be deceived and confused in an adverse to plaintiff manner that they are still seeing Defendants drama instead of the Plaintiff's drama." Tis is taken from the Petition For Hearing to California Supreme Court page 9, and on page 3:

"The defendant damaged the plaintiff's title by using it with a feature motion picture film distributed in theatres by distorting the title for

own uee."

From First Amended Complaint p.18, par. 54:

"The defendants damaged the plaintiff's title by using it for a motion picture film in which it pretended a brain transplant was possible by showing a story of a white D.S.'s brain being transplanted to a balck man, and then, the black man became a truth-finding and just D.S., which may have insulted the intelligence of black people who saw it."

From First Amended Complaint 18,par.53:

"The defendants damaged the plaintiff's title by using it with a film in which the leading character tood God's name in vain about four times."

From p. 9 of Petition to Calif. S.CT.:

" The title CHANGE OF MIND was distorted, diffused, diluted and disparaged by the defendants, which caused plaintiff's title to lose important value thereby.

"A constructive implied-in-law contract, which is not a true contract, but based on supposition if there had been a contract the damages could be measured.

"Implied-in- law contract is sometimes referred to as a quasi contract. The assent is implied, because the defendants misappropriated the copyrighted title of the plaintiff identically word for word indicating the defendants though the plaintiff's title had value in attracting customers for their drama.

"The consideration, according to the

"constitutional issue the title is not only protected together with the drama, it is an integral part of the drama and is attached to the drama and it would be taking intangible property to sever the title from the drama. The defendants had no legal right to detach or separate or divorce the title from the drama and that is consideration for a constructive implied-in-law contract, because the plaintiff could have sold the title to a bona fide purchase for value, or as in this case reserved it for his own drama by copyright

" The damages would be measured as if an actual under these conditions of constructive notice by copyright infringement had arose in this tort situation.

The plaintiff has said there are

$25,00 in compensatory damages for restitution to make the plaintiff whole, and for the benfit received.

And from First Amend. Complaint p.70, Weitzenkorn v Lessor, 40 Cal.2d 788: "'..it is an obligation created for the reasons of justice.'"

CONCLUSION

It is sumitted an error in law and manifest abuse of discrtion existed in that the there were two triable issues of fact, two causes of action upon which relief can be granted, and a permanent injunction be issued, and for each cause of action $25,000 in damages be awarded, and the case be remanded to the California Supreme Court to be sent to the lower courts for trial on the issues and in the alternate remanded for a second amended complaint.

This petition for hearing in the SUPREME COURT OF THE UNITED STATES is hereby submitted by,

Arnold Arthur Sonderegger
In Propria Persona
233 So. Lafayette PK.PL.
Apt. 122, Los Angeles,
California 90057

SWORNED ON AND BEFORE ME THIS 8th DAY OF SEPTEMBER 1976

Susan L. Gold

Susan L. Gold, Notary Public
County of LOS ANGELES,
State of CALIFORNIA

OFFICIAL SEAL
SUSAN L. GOLD
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires April 29, 1978

NOT FOR PUBLICATION

COURT OF APPEALS OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ARNOLD ARTHUR SONDEREGGER, Plaintiff and Appellant, v. SAGITTAIUS PRODUCTIONS, INC., CINERAMA RELEASING CORPORATION andSEELEG LESTER, Defendants and Respondents.	2d Civil No. 46374 (Sup. Ct. No. C 76909) (Filed Apr.,13, 1976)

Appeal from orders of the Superior Court of Los Angeles County. Arnold Levin, Judge Pro Tempore*, and Norman R. Dowds, Judge. Affirmed.

Arnold Arthur Sonderegger, in propria persona, for Plaintiff and Appellant.

Jones & Wilson and Lawrence Borys for defendants and Respondents.

*Pursuant to stipulation, See Const.art. VI, ss22.

BEST COPY AVAILABLE

The trial court sustained defendants' general deummers without leave to amend, and entered orders of dismissal of plaintiff's first amended complaint.[1] He appeals from the the orders.

The first amended complaint, the non-conclusionary allegations of which we accept as true, alleges: In February 1950 plaintiff copyrifhted with the Federal "Copyright Office" an original play authored by him title "Change Of Mind," the copyright to run for 28 years from the date. The play was never "produced or published." On October 1, 1969, defendants caused to be printed in both the Los Angeles and New York Times newspapers an advertisement for a motion picture title "Change Of Mind." This ad, in referring

1.Richard Wesson was also named as a defendant in the pleading but is not a party to the appeal.

to the movie, contained the following language: "'Written by Seeleg Lester and Richard Wesson.'" Thereafter the motion picture was shown in 37 different theatres in New York, about 27 in Southern California and one in New Jersey. Although the picture did ot use any of the context of palintiff's play, defendants separated "the title from the work" and used "plaintiff's title for their own dramatic work"; and"(t)he defendants infringed the common law copyright by misappropriating the plaintiff's title, because the title had distinctivness (sic)." The complaint prayed for "an accouting of all the profits from the film using the plaintiff's title, CHANGE OF MIND"; compensatory damages for the use of the title and for "breach of implied in fact and in law contract" with plaintiff; punitive damages for defendants'

wilful use of the title after being put on notice of the "infringement", and that "a permanent injunction issue to restrain defendants from using the title."

Corporate defendants demurred to the complaint on the grounds that it did not state a cause of action and was barred by the applicable statute of limitations (section 339, subsection 1, Code of Civil Procedure); defendant Lester devurred separately on the ground that the complaint did not state a cause of action. The trial court entered a minute order sustaining Lester's demurrer without leave to amend, on the ground of "failure to state facts sufficient to constitute a cause of action"; and another, sustaining the corporated defendants' demurrer without leave to amend, "for failure to state a cause of action and because of statute of limitations." It thereafter entered separate orders of

dismissal in relation to each minute order.

The caption to the first amended complaint indicates that it was filed by plaintiff in propria persona, and in the form and content the pleading plainly discloses that it was prepared by a lay-person, for it is inartful and contains allegations which are clearly irrelevant and superfluous to the action. However, the pleading sufficiently sets out allegations averring that defendants misappropriated the title of plaintiff's copyrighted play on a motion they produced although they did not use any of the subject matter contained in the play itself. Thus, because the trial court dismissed the cause of action, we are face squarely with the issue of whether the use of the bare title of a literary work on an entirely different creative work is actionable.

Tomlin v Walt Disney Productions, 18 Cal. App.3d 226, is dispositive of the issue.[2] Therein the court pointed out: "The title to a literary or musical composition is not protectible by copyright..."; and cited Sears, Roebuck & Co. v Stiffel Co., 376 U.S. 225 (11 L.ED2d 661, 84 S.CT. 784) and Compco Corp. v Day-Brite Lighting Inc., 376 U.S. 234 (11LED.2d 669, 84 S.CT. 779) as representing the holding of the United States Supreme Court "that when an article is unprotected by patent or copyright, a state cannot, through the application of its laws on unfair competition, prohibit the copying of an article nor award damages for such copying." (P.231) The court said

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2 In Tomlin, plaintff had copyrighted a a song titled "The Love Bug Will Bite You (If You Don't Watch Out)." Subsequently, defendants released a motion picture title "The Love Bug." Plaintiff sued for compensatory and exemplary damages for misappropriation of the title, and an injunction ro prevent defenants' further use thereof.

in this respect in relation to "the misappropriation theory" pertaining to "a property right: in a title: "Since Sears and Compco, the appropriation theory of state protection for literary titles retains no vitality...Thus, California courts may not grant injunctive relief to prevent the use of a title of a literary or musical composition nor can it award damages for the appropriation of such title. (Court's Itailics)

In the case at bar, Tomlin's claim is misappropriation. At the time of Tomlin's deposition his counsel stated that his claim of damages was based on the wrongful use of the title by Disney and that the damages were to be clculated as the reasonable value of such use. Tomlin's complaint prays for damages for the 'wrongful taking of plaintiff's property.' In his answers to Disney's interrogatories Tomlin stated

that his claim for damages arose 'from the unauthorized use by (Disney) of (Tomlin's) property..."(Italics added.) No other claim of damages was presented to the trial court. Tomlin also seeks a broad permanent injunction against the use of 'plaintiff's title' by Disney. This prayer is also clearly predicated upon a theory of misappropriation. The relief which Tomlin seeks and the theory upon which it is sought cannot be constitutionally countenance in light of Sears and Compco." (Pp. 234,235-236.)

Tomlin points up one further issue which must be resolved. The prayer of the complaint herein concludes with the usual plea that "Plaintiff have such other and further relief as is just by the court." In Tomlin the court deemed a similar prayer as permitting the trial court, pursuant to its equitable powers, to consider a separate and related issue not itself

pleaded whether under the ultimate facts averred, the court could grant relief to the plaintiff on one theory not foreclosed to state courts by the "Sear-Compco rule," "the so-called passing off theory whereby a competitor was prevented from practices designed to 'pass off' his works to the public as if they were those of another." In this respect Tomlin holds that a literary title could be the subject of the "passing off theory" if (1) the title had acquired a "secondary meaning" and (2) there was a liklihood of confusion in the mind of the public between the plaintiff's literary work and the defendant's (3) occurring as a result of the defendant's wrongful and intentional failure to take precaustions to prevent that confusion. Tomlin refers to these three factos as follows: "The first two elements are interdependent

and necessary to support injunctive relief. The third element added to the other two is necessary for an award of damages." (P.236) Therefore, we apply these elements to the averments of the within complaint.

As to the requirement that plaintiff's title must have acquired a "secondary meaning," this term is comprehensively defined in Gordon v Warner Bros. Pictures, Inc., 269 Cal. App. 2d 31, wherein plaintiff had given the title "The FBI Story" to a book he authored, and thereafter defendant used the same title on a motion picture which otherwise related to an entirely different subject matter: "A sine qua non of protection of titles on a theory of unfair competition is the establishment by the plaintiff of a secondary meaning in his title. (Jackson v Universal Internat. Pictures, supra, 36 Cal. 2d 116,

121; Cowles Magazines & Broadcasting, Inc. v. Elysium, Inc., 255 Cal. App. 2d 731,733 (63 Cal. Rptr. 507): see Nims, The Law of Unfair Competition and Trad-Marks (4th ed. 1947 §274a, p. 894; Nimmer, (on copyright), supra, §34 at pp. 141-142; Restatement of Torts (1938) §716.) According to Nims, supra, §37 at P. 154, one of the best known and most accurate summaries of the secondary meaning rule is as follows: "Primarily, it would seem that one might appropriate to himself for his goods any word or phrase that he chose; but this is not so, becasue the broader public right prevails, and one may not appropriate to his own exclusive use a word whcih already belongs to the public... (The theory of secondary meaning) contemplates that a word or phrase originally, and in that sense primarily, inc pable of exlucsive appropriation with reference to an article on the market, because geographically or otherwise descriptive, might nevertheless

have been used so long and so ezclusively by one producer with reference to his article that, in that trade and to that branch of the purchasing public, the word or phrase had come to mean that the article was his product; in other words, had come to be, to them, his trade-mark. So it was said that the word had come to have a secondary meaning, although this prhrase, "secondary meaning," seems not happily chosen, because, in the limited field, this new meaning is primary rather than secondary; that is to say, it is, in that field, the natural meaning.' (G.&C. Merriam Co. v Saalfield (6th Cir. 1912) 198 F.369, 373.) The California Supreme Court has stated the rule as follows: '"If plaintiff proves that the name or word has been so exclusively identified with his goods or business as to have acquired a secondary meaning, so as to indicate his goods or business

and his alone, he is entitled to relief."' (Italics added.) (Academy of Motion Picture Arts & Sciences v Benson, 15 Cal. 2d 685, 690 (104 P.2d 650); Cowles Magazines & Broadcasting, Inc. v Elysium, Inc., supra, 255 Cal App.2d 731 at P.735.) The Restatement of Torts, supra, comment (f), states, 'A designation is a trade name only if, apart from other requirements, it has acquired a special significance as the name of the goods, services, or business of one person. Until the designation has acquired this special significance, it is not protected as a trade name. Acquisition of this special significance, rather than priority of use, is, therefore, a necessary condition of protection against infringement of a trade name.' (Italics added. It can be seen from the foregoing statements of the rule of secondary meaning that plaintiff 'must show that his mark means him else he

cannot prevent others from using it.' (L. Hand, J.)(Bayer Co. v United Drug Co.(S.D. N.Y. 1921) 272 F. 505, 513.)" (Pp.35-36.)

The court further stated at page 38: "However, if the title had no seconary meaning as referring exclusively to plaintiffs' book, defendant had a right to use that title and an intent to deceive could not be inferred from the fact that the defendant used it. As Nims says, 'Unless (secondary meaning) be proved the defendants are not in the wrong, for they are merely using a name to which they have as much right as has the plaintiff, and there is no room for a charge of fraud or unfairness.' (Nims, supra, §37, p. 157.)" On this issue of "Secondary meaning," the only averments in in the complaint herein even remotely relating to this subject set forth only that plaintiff's play is listed in a "United States Government publication called

Copyright entries Jan.--June 1950," 3/ and this publication could be found in 775 depcsitory libraries throughout the United States and Puerto Rico.4/ Clearly, these allegations fall fra short of establishing that the title "Change Cf Mind" had acquired the requisite "seconary meaning."5/

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3 "From the United States Government publication called Copyright entries Jan.-June 1950, Dramas, and Workd for Oral Delivery on page 13:

"'Change Of Mind, DU23122. See Sonderegger, Arnold Arthur.' In the same publication as above the cross-reference to author is on page 14:

"'Sonderegger, Arnold Arthur. Change Of Mind, a dramatic play in seven scenes. c Arnold Arthur Sonderegger; lc 6 Feb50 DU23122.'"

4 "The defendants had acess by receiving constructive notice as professionals that

the title was copyrighted with its works- together- by the published in book form catalog of copyright entries the title of the drama that is available for reading in about 775 depository libraries, which covers the fifty states, the District of Columbia, and the United States Territory of Puertc Rico. And in California the Los Angeles County Law Library and the U.C.L.A. library has available copyright entries constructive notice that the title CHANGE OF MIND was copyrihted with its works by Arnold Arthur Sonderegger. The publication of the copyright entries gave inquiry notice to people dealing in the intangible property business."

5 "Mere priority of use does not create or establish a 'secondary meaning' for a title." (Tomlin v. Walt Disney Productions, 18 Cal. App. 3d 226, 237.)

As to the second and third elements, the requirements that there exist the

likelihood of confusion in the mind of the public between the two works and defendant must have failed wrongfully and intentionally to take precautions to prevent such confusion, the court in Tomlin, quoting from Gordon v Warner Bros. Pictures, Inc., (pp. 39-40) said: "'in order to recover damages, plaintiffs must prove as an essential element of their cause of action that defendant copied the title...with the intent to deceive the public into believing that its motion picture was based upon or connected with plaintiffs' book'" (pp.234-235); and concluded: "The parties to this action are not engaged in teh same or what could be liberally construed as competing businesses and Tomlin failed to plead or present any 'special circumstances' from which public confusion would likely result." (p.237) Similarly, the complaint herein contains

no averments pertaining to any of the foregoing.

Warner Bros. Pictures v Majestic Pictures Corp.,70 F 2d 310 (2d Cir. 1934), on which appellant primarily relies, is readily distinguishable in that the ruling therein granting an injunction restraining defendants' use of the title "Gold Diggers Of Paris" in a motion pciture, in conflict with plaintiff's prior use on its own movie of the name "Gold Diggers of Broadway," was based on federal law; and the trial court expressly found that plaintiff's title had acquired a 'secondary meaning," and defendants' use thereof 'would be unfair and misleading, for they represent to the public that the picture exhibited was produced by Warner Bros..."(P.312) Johnston v. 20th Century -Fox Film Corp., 82 Cal App. 2d 796, also cited by appellant, is similarly distinguishable, because it pertains

to an express oral contract, in relation to the title of a book published by plaintiff, to pay $20,000 ofr use on a movie of "the title alone," which title the court specifically found had acquired a "secondary meaning."

Clearly, it does not appear that the first amended complaint, appellant's second cause of action under the foregoing principles and appellant makes no contention that it could be. "Where an appellant does not indicate, either in the trial court of this court, the manner in which the complaint is proposed to be amended, an abuse of discretion (in sustaining a demurrer without leave to amend) is not shown. (Filice v. Boccardo, 210 Cal.App.2d 843, 847)" (Hilton v Board of Supervisors, 7 Cal. App. 3d 708, 716.)

In light of our opinion herein, we deem it unnecessary to review the validity of

the second ground (statute of limitaions) on which the demurrer of the corporate defendants was sustained.

The orders of dismissal are affirmed.

LILLIE, J.

We concur:

WOOD, P. J.

THOMPSON, J.